

THE SEAMEN'S CHURCH INSTITUTE
OF NEW YORK AND NEW JERSEY

Testimony of

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Before the House Subcommittee on

Coast Guard and Maritime Transportation

June 20, 2006

Chairman LoBiondo and Subcommittee members, I am pleased to be here today at the Subcommittee's invitation to testify on proposed amendments to the United States Penalty Wage Act. I am also prepared to provide testimony on maritime security issues related to port chaplains' access to maritime terminals and the proposal to place limitations on maritime liens on fishing permits.

My name is Douglas Stevenson. I direct the Seamen's Church Institute's Center for Seafarers' Rights. The Seamen's Church Institute of New York and New Jersey, founded in 1834 to improve the treatment of merchant seafarers in the Port of New York, is the largest, most comprehensive not-for-profit merchant mariners' agency in North America. Headquartered in Manhattan, with facilities in New Jersey, Kentucky and Texas, the Institute every year serves more than 150,000 merchant mariners from 75 different countries through its programs of hospitality, professional training and worldwide legal advocacy.

Mr. Chairman, there is no law that better expresses what America stands for, that confirms American values, than the United States Penalty Wage Act. Enacted by the first Congress in 1790 and strengthened in 1872, 1898 and 1915 to enhance seafarers' protections, the statute simply requires shipowners to pay their seafarers their hard-earned wages promptly.

The purpose of this statute is to protect seamen from "arbitrary and unscrupulous" refusals of their employers to pay their wages. Requiring ship owners to pay seamen their wages promptly was intended to prevent ship owners from using the threat of nonpayment to force seamen to release the ship of all claims¹ and to prevent seafarers

¹ Petersen v. Interocean Ships, Inc., 823 F.2d 334, 336 (9th Cir.1987); Fanos v. Maersk Line, Ltd., 246

from being put ashore penniless and becoming a public charge on the harbor.² The Act is purposefully simple to encourage quick payment of wages without the need for lengthy procedures or judicial interpretation.³

The Act attempts to deter unscrupulous shipowners from withholding seafarers' wages by imposing a two-day penalty for each day that wage payments are delayed. The penalty is imposed only when the delay was caused by arbitrary and unscrupulous acts or omissions. The text of the statute makes clear that penalty wages do not apply every time a seaman's wages are not paid in a timely manner. A seaman is entitled to penalty wages only when the failure to pay is without sufficient cause. Without sufficient cause means either conduct which is in some sense arbitrary or willful, or at least a failure not attributable to impossibility of payment.⁴

After analyzing court decisions relating to the Penalty Wage Act, two things are clear: in the majority of cases the employer will not have to pay a penalty if there was sufficient cause for the withholding; and a penalty will be imposed only if the employer has acted in a dishonest or very high handed way.⁵

Since the very beginning of this great nation, the Congress and the American courts have recognized the arduous work and occupational perils that threaten merchant mariners' welfare and well-being. The Congress and the Courts also have long recognized that merchant mariners work under the disproportionate bargaining power of the shipowner from the moment articles are signed until final wage payment is received; and they are particularly vulnerable to exploitation and abuse by unscrupulous shipowners. In response to such threats, and recognizing the crucial contributions that merchant mariners make to our nation's economy and security, the Congress and the courts have zealously safeguarded seafarers' rights.

Mr. Chairman, the special protections accorded to merchant mariners by the Penalty Wage Act are as relevant and necessary today as they were in 1790, 1872, 1898 and 1915. The necessity to preserve these protections accorded to vulnerable seafarers was recently demonstrated by three separate class-action lawsuits against cruise line companies Norwegian Cruise Lines (NCL), Royal Caribbean Cruise Lines (RCCL) and Carnival Cruise Lines (CCL). The NCL case involved approximately 5,000 seafarers, the RCCL case involved approximately 8,000 seafarers and the CCL case involved approximately 15,000.

The three lawsuits alleged very similar courses of conduct that deprived workers of overtime pay. In all of the lawsuits the workers were foreign nationals from developing countries working on cruise vessels registered in foreign countries. All of the workers

F.Supp.2d 676, 680 (S.D.Tex.2003), aff'd 363 F.3d 358 (5th Cir.2004)

² Belidor v. L/P/G Bengehazi, 653 F.2d 812,818 (3rd Cir. 1981), 1981 A.M.C. 2427.

³ Bunn v. Global Marine, Inc., 428 F.2d 40, 45 (5th Cir. 1970); H. R. Rep. 1657, Committee on the Merchant Marine and Fisheries, 55th Cong., 2d Sess.

⁴ Collie v. Fergusson, 281 U.S. 52, 55, 50 S.Ct. 189, 191, 74 L.Ed. 696 (1930); Fanos v. Maersk Line, Ltd., 363 F.3d 358, 362 (5th Cir.2004).

⁵ Thomas Schoenbaum, Admiralty and Maritime Law, Fourth Ed. Vol.1, p. 281

had similar ten-month contracts that required them to work seven days a week for ten hours a day or 70 hours per week. Hours in excess of the regular 70 hours a week were supposed to be paid a special overtime pay. The cases alleged that seafarers worked from 10 to over 20 hours of overtime work a week without being paid the overtime wages. The cases alleged that some seafarers had been coerced to work without pay; some seafarers had been intimidated by threats of losing their jobs if they did not work extra hours without pay; management on some cruise records kept sloppy time records that failed to show how much seafarers actually worked and supervisors on some ships falsified hours of work records and coerced seafarers into signing them.

Many of the seafarers involved in the cases worked for tips. Their contracts provided for a salary of \$50.00 per month (approximately 16 cents an hour). The bulk of their earnings came from passengers' tips, not from the cruise lines. Seafarers could earn between \$1000 and \$3000 a month in tips, if passengers tipped according to the cruise lines' recommendations.

All three of the class action cases have been settled by the parties out of court. The settlements did not produce wind-fall recoveries for the affected seafarers. In the NCL settlement, seafarers were eligible for compensation of between \$3.00 and \$72.00 a month for the months they were denied overtime pay. The RCCL case was settled for \$14.2 million to be divided between up to 8,000 claimants after litigation expenses have been deducted, leaving an average of about \$1,000 available for each claimant. The CCL case was reportedly settled for \$6.25 million (about \$2.4 million less than the CCL's CEO's compensation for 2005) to be divided, after litigation expenses, between 15,000 potential claimants, leaving less than about \$400.00 available for each claimant. These estimates are based on the reported recoveries distributed amongst the class claimants. While only they are only estimates, they show that there the settlements did not provide for large penalty wage rewards for the seafarers. In most cases, the seafarers are unlikely even to recover all of their lost wages.

The cruise lines have responded to these lawsuits by asking Congress to amend the Penalty Wage Act's application to seafarers working on passenger vessels. The following are my comments to their proposals:

SECTION 308 PASSENGER VESSEL PENALTY WAGE

(a) FOREIGN AND INTERCOASTAL VOYAGES

Proposal 1 would change existing law in 46 USC 10313(f) by confirming that deductions, withholdings and allotments may be taken from a seaman's wages, would remove the requirement to pay wages within 24 hours after cargo has been discharged from a passenger vessel and would allow masters of passenger vessels to delay paying their seafarers wages for 30 days after commencing the voyage.

Comments:

- As will be discussed below, passenger vessels wish to reduce their obligation to pay crew expenses by transferring more and more of their obligations to the seafarers themselves through deductions, allotments and withholdings. This strategy should not be endorsed by enacting the proposed changes.
- The amendments would require the passenger ship operator to pay wages within 4 days of discharge or 30 days from the commencement of the voyage. This would enable an unscrupulous passenger ship operator to have three extra days to pay wages to discharged seafarers than is allowed in existing law. By this time a foreign seafarer would be long-gone and essentially unable to recover his or her wages or to take advantage of the statute.
- The requirement for paying wages within 24 hours of discharging cargo should be retained for passenger vessels. If this provision were removed, unscrupulous passenger vessel operators could discharge foreign seafarers without pay, and because foreign seafarers must leave the United States as soon as they are discharged, the seafarers would be left without a practical remedy for recovering their wages.

Proposal 2 would add a new requirement in 46 USC 10313 (g) for seafarers on passenger vessels to give written notice of a wage claim within 180 days of their receipt of information giving notice of a disputed payment or within 30 days after termination of the seafarer's employment contract. The proposal would change the penalty from 2 days' wages to "not to exceed 2 days' wages" and it would delay starting the penalty for 60 days from the master's, owner's, operator's or employer's receipt of the seafarer's written notice. The proposal establishes a procedure for the master, owner, operator or employer to place the disputed amount in an interest bearing account and commence legal action to determine the merits of the claim. The proposal would also bar any seafarer's wage claim if the seafarer did not follow the notice requirement.

Comments:

- These proposals would effectively repeal the Penalty Wage Act's protections for seafarers working on passenger vessels. They would overturn the basic principles of the Penalty Wage Act by turning a simple, uncomplicated and consistent deterrent to all unscrupulous shipowners into a complicated and unpredictable tool for unscrupulous passenger vessel operators to avoid their obligations to pay their crews' wages.
- The notice requirements shift the burden of ensuring that seafarers on passenger vessels are properly paid their wages from the shipowner to the seafarer. Shipowners should be encouraged, by the deterrent effect of the Penalty Wage Act, scrupulously to keep accurate records of their seafarers' hours of work and wages. The notice requirements remove that deterrent by requiring seafarers to keep accurate records and give notice of any underpayments. Unscrupulous

shipowners will already know, or should know, if they are properly paying crew wages. Making the penalty dependent upon seafarers complying with the complicated notice requirements would provide an unscrupulous passenger vessel operator a mechanism for avoiding obligations to pay wages. Principled passenger vessel operators have nothing to fear from the existing Penalty Wage Act because penalties are imposed only when wages are withheld “without sufficient cause”, defined by the courts, as “arbitrary and unreasonable”.

- Placing a 180-day notice requirement on employed seafarers would allow an unscrupulous passenger ship operator to unjustly withhold wages because an employed seafarer would not risk certain dismissal by filing a notice of claim while employed.
- The procedure for passenger ship operators to place disputed wages in an interest bearing account and commence legal action would provide yet another way for an unscrupulous employer to avoid paying crew wages and penalties. By the time this procedure could be used, the affected foreign seafarer would be long gone and unable to defend his claim in court. Even if the seafarer were in the United States, the litigation expenses of defending the claim would be prohibitively high. Unscrupulous employers could simply put the disputed claim in escrow, wait for a default judgment and be exonerated from any future claim or maritime lien for the unpaid wages.
- The proposal would make the penalty unpredictable and uncertain for passenger vessels. The proposed penalty "shall not exceed 2 day's pay." This means that a court would have to determine the penalty, without criteria, in each case. This would certainly require more litigation and unpredictability. The penalty should be an amount certain that provides a sufficient deterrent to an unscrupulous passenger vessel operator. If the penalty is to be changed, recent litigation would suggest that the existing penalty does not provide sufficient deterrence, and it should therefore be increased.
- The amendments would allow passenger vessels to delay paying wages without any penalty for 60 days. Not only would this provision remove any deterrent for passenger vessels to pay wages on time, it would also remove any capability for foreign seafarers to enforce their wage claims. More importantly, the change would put the onus on seafarers to keep track of their wage entitlements instead of encouraging passenger vessel operators to put controls in place that would ensure that their crews are properly paid. There would be no incentive for an unscrupulous passenger vessel operator to invest in systems that would ensure their crews are properly paid when there is scant chance that they would be penalized if they don't.
- The amendments would bar seafarers' wage claims if seafarers do not comply with the complicated notice requirements. This change, if enacted, would produce an unprecedented rejection of basic concepts of maritime law. The

Penalty Wage Law would be of little value to seafarers if it did not allow a lien on the vessel. Maritime liens are unique security devices that are designed to keep vessels moving in commerce while not allowing them to escape their debts by sailing away⁶. The Supreme Court has declared that "seamen's wages ... are sacred liens, and, as long as a plank of the ship remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages."⁷ The sacred maritime lien for wages is an important remedy that must be retained in conjunction with the penalties of the Penalty Wage Act. Seafarers should not be deprived of this remedy by enacting the proposed amendments.

Proposal 3 would amend 46 USC 10313 (j)(1) by adding provisions allowing passenger vessel masters, owners, operators or employers to make deductions or allotments from seafarers' wages for health, life, accident, or disability insurance premiums for the seafarer and his or her family. The allotments would require the seafarer's consent in an employment agreement or other written consent. Deductions would be limited to a maximum of 10% of seafarers' total income, including tips. The proposal creates a statute of limitations for wage claim court actions of three years from the commencement of the voyage.

Comments:

- Seafarers are not asking for deductions to be made from their wages for medical insurance or other purposes. Seafarers prefer being paid in cash and distrust the intentions behind the proposal.
- The proposal is intended to allow passenger ship operators to reduce their obligations to provide medical care for seafarers by inducing them to take out their own medical insurance as a condition of employment on a passenger vessel. One of the oldest and most enduring rights seafarers enjoy is their right to free medical care. This right, called maintenance and cure, is so firmly established in maritime law, that it is an assumed part of every mariner's employment contract. It is a right so fundamental that no individual mariner can give it away by contract. However, passenger vessel operators can require seafarers voluntarily to agree deductions from their pay for medical insurance. It would not be prohibited by law for a seafarer voluntarily to buy medical insurance in addition to his or her employer's medical benefits. Passenger vessel operators could thereby reduce their medical insurance expenses if the seafarers' medical insurance policy became the prime cover.
- This proposal would allow passenger vessel operators to be freed from paying tip earning employees any wages at all – and also to take some of the seafarers' tips to pay for medical insurance. Ten percent of the total earnings of a tip-earning

⁶ *Equilease Corp. v. M/V Sampson*, 793 F.2d 598, 602 (5th Cir. 1986) (en banc), cert. denied, 479 U.S. 984 (1986)

⁷ *The John G. Stevens*, 170 U.S. 113, 119 (1898).

employee would be much more than the wages paid to tip-earning seafarers. (They are typically paid \$50.00 per month and earn from \$1,000 to \$3,000 in tips.)

- The proposed statute of limitations would unfairly start the running of the statute even before a wrong has occurred. Rather than the usual requirement that a statute of limitations begins to run when the injured party knows, or should know, about the wrong, the proposal statute of limitations would start running when the voyage commences.
- The current time limitation for commencing lawsuits to enforce the Penalty Wage Act has up to now worked well and is not in need of amendment. If, however, a statute of limitations is to be included in the Penalty Wage Act, it should be at least three years (which is consistent with admiralty practice) from the time when the seafarer knows or should know about the wrongful withholding of wages.
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Proposal 4 would amend 46 USC 10314 (a)(1) by allowing passenger vessel operators to make advance payments of seafarers' wages to pay for the medical insurance.

Comment:

- By allowing passenger vessel operators to make advance wage payments for seafarers' medical insurance, the operators could become like "company stores" making seafarers indentured to them for expenses that the ship operators rightfully should bear themselves.

Proposal 5 would amend 46 USC 10315 to allow passenger ship operators to take deductions from seafarers' wages for their and their families' medical insurance premiums and would permit them to make allotments to financial institutions and agents designated by the seafarer.

Comments:

- See comments to proposals 3 and 4 above.
- Current law would prohibit foreign vessels from making allotments that do not conform to the protections in 46 USC 10315 (allotments can be made only to designated close family members or accounts in the seafarer's name that are insured by FDIC or FSLIC) from seafarers wages while the vessel is in United States waters. The statute does not apply to foreign flag vessels while they are outside of the United States. The Republic of the Philippines requires their citizens working on foreign flag vessels to remit by allotment 80% of their wages to accounts in the Philippines. Presumably, cruise vessel operators have already developed a mechanism for making legitimate allotments from Filipino seafarers' wages that conform to United States and Philippines law. I am concerned by the

proposal's authorizing allotments to accounts that are not in the seafarer's own name, especially to "agents". It is a common practice for recruiting agencies in foreign countries to require seafarers' to pay illegal placement fees that are repaid to the agents by allotment. In addition, deductions are sometimes made from seafarers' pay for repatriation expenses that should be paid by the employer. Before enacting the proposed allotment authorizations, there should also be established a quick and easy administrative mechanism under United States law for seafarers to recover from their employer improper or illegal deductions and allotments.

- I am also concerned about authorizing allotment payments to a "retirement account in any financial institution." If allotments are to be made to a retirement account, there should be assurance that the contributions are fully vested and available for withdrawal by the seafarer.

Proposal 6 would exempt would allow passenger ship operators from the requirements for seafarers' trust funds of 46 USC 10316 for deductions or allotments made for seafarers' medical insurance premiums.

Comments:

- See comments to proposals 3 and 4 above.

(b) COASTWISE VOYAGES

The proposals for coastwise voyages generally parallel those proposals for foreign and intercoastal voyages. There are significant differences that suggest that the proponents of the changes to the Penalty Wage Law wish to diminish rights for foreign seafarers working on foreign flag vessels. For example, in proposal 1, unlike seafarers on foreign and intercoastal voyages, seafarers on coastwise voyages must be paid wages when discharged or the employment ends without having to wait four days. The penalty for failing to pay wages without sufficient cause to seafarers on coastwise voyages is a certain 2-days wages, not the "no greater than 2-days' wages" for those on foreign and intercoastal voyages.

Comments:

The comments made to proposals in section (a) for foreign and intercoastal voyages relating to Notice, Failure to Give Notice, Statute of Limitations, When Penalty Wages Begin to Accrue and Deductions for Medical Insurance Premiums apply as well to coastwise voyages.

- All seafarers, including those on foreign and intercoastal voyages, should be paid their wages immediately upon termination of their employment without having to wait four days.
- There is no reason why the penalty should be different for coastwise and international and intercoastal voyages.

Summary to Section 308:

Mr. Chairman, there are many ways to look at the cruise industry's proposals to change the United States Penalty Wage Law. I offer this perspective: The cruise industry, which chooses to avoid obligations under US law by operating their vessels under foreign flags and employing foreign workers earning scant wages, is asking the Congress to protect their industry from penalties under United States law if they arbitrarily and unscrupulously fail to pay their foreign seafarers on their foreign flag vessels the seafarers' meager wages that they worked so hard to earn.

Rather than throwing out over 200 years of important legislation and jurisprudence protecting all seafarers in United States ports, I respectfully request the Congress to reject the cruise industry's proposals to amend the Penalty Wage Law. The cruise industry should instead be asked to initiate a proactive program, as they are doing so well with environmental concerns, that will change the culture of the cruise industry by scrupulously paying their crewmembers their earned wages, by putting in place accurate record-keeping systems that will accurately record the hours their crewmembers work and by establishing a zero tolerance policy against intimidating their crewmembers who seek only to enjoy their legal entitlements.

When the cruise industry was hit with several marine environmental violations in the late 1990's, the cruise industry did not go to Congress to request repealing the environmental laws' application to passenger vessels. Rather the cruise industry initiated a responsible and commendable industry-wide program designed to eliminate polluting the marine environment from cruise vessels. The cruise industry can and should initiate a model industry-wide program to ensure that all seafarers' entitlements on passenger vessels are scrupulously protected.

SECTION 310 SEAMEN'S SHORESIDE ACCESS

Proposal: Amend 46 USC 70103 by adding a provision requiring facility security plans to provide a system for allowing seafarers and representatives of seamen's welfare agencies and labor organizations access through the facility in a timely manner and at no cost.

Comment: Regulations implementing the Maritime Transportation Security Act and the International Ship and Port Facility Security Code require all shore facility security plans to contain procedures for facilitating shore leave as well as access to ships by representatives of seafarers' welfare organizations. The requirements are based on the principles that seafarers have primary security duties under the ISPS, and they should be viewed as partners in the new security regime rather than as potential threats to security.

Since coming into force on July 1, 2004, several shore facilities in the United States have subverted intent of the security requirements by placing obstacles to seafarers and representatives of seafarers' welfare agencies in the form of exorbitant escort fees and onerous administrative requirements. Enacting this provision would improve maritime security and enhance seafarers' welfare and well-being. Attached is our latest survey of shore leave and port chaplains' access issues at shore facilities in the United States.

Terminal Access Issues

JUNE 2006

PORT	ISSUE
Baltimore, MD	<p>Maryland Port Authority Terminals: Seafarers cannot walk to phone booths in State terminals. No port arrangement to transport seafarers to phone booths or to front gate of terminal, rely on sporadic taxi service and 2 vans of seafarer center. Upon return, have to pay for taxi to wait at gate for security escort to arrive, frequently for long periods of time. One reported instance of seafarers having to walk to the gate (25min), with no taxi service allowed in terminal.</p> <p>Private terminals generally allow access for chaplains with proper notice & identification.</p>
Boston, MA	<p>Gulf: Recently switched from providing transportation to/from gangway to only allowing access if chaplain van or one hired through agent @ \$150 per 30hr round trip.</p> <p>Prolerized: Scrap metal dock denied shore leave due to liability reasons due to unsafe conditions on dock.</p>
Houston, TX	<p>Westway Terminal: \$700 to transit dock. Jetty gates padlocked when gateman not present.</p> <p>Magellan Terminal: charges seafarers \$25 for ride to gate and additional \$25 to return to vessel, in areas less than 100yard walk through non-operational part of terminal</p>
New Haven, CT	<p><i>Magellan Terminal: Director of Security denies access unless chaplains provide armed Port Security personnel to board vessels at cost of \$250 per visit.</i></p>
Port Arthur, TX	<p>Sunoco Oil Nederland Terminal, Port Arthur: Crew changes must be conducted waterside. No crew access to vessel through terminal. No stores delivery permitted through facility. Waiver on case-by-case emergency basis. Crew boats available for \$125/hr, \$5/hr fuel surcharge, 2hr min. Functional equivalent of shore leave denial as crew launch can only come alongside when ship is not pumping out oil.</p>
Portland, ME	No problems reported.
Portsmouth, NH	No problems reported.
Port of New York/New Jersey	<p>ConocoPhillips Bayway: Chaplains have limited access and must be driven down by security from Bayway. Ship's company must pay for these transports, so they are not eager to authorize many visits. Many logistical difficulties reported, even with pre-arranged visits/service. No seafarers allowed off vessels. In theory, security may walk to the gate with seafarers charge a minimum of \$200.00 each way. The owner or captain pays and this occurs for crew change or medical emergency. Unconfirmed if US citizens allowed off.</p> <p>KMI (Kinder-Morgan), Carteret: Chaplains with proper ID and who are on the visitor's list for the day (we are routinely placed on this list) may drive down to the berths for ship visits. they make it virtually impossible for seafarers to go ashore. Chaplains may not take them seafarers in vans, and the terminal charges \$300 (possibly \$350) for a one-way ride to the gate (round trip \$600) per person.</p> <p>Seawaren/ Perth Amboy: Motiva I & II: Chaplains had access with proper ID and if on the visitors' list, no one allowed off ship, even with U.S. visa. Now chaplains can no longer drive down to the tanker in previously allowed vans. Security now charging \$300 per ride to the berth. (\$600 round trip).</p> <p>Chevron: Chaplains have access, no one allowed off ship.</p> <p>Stolt/OBT: Chaplains have access; those with U.S. Visas are allowed off if they pay for security: \$300 one-way, \$600 round trip per person. Chaplains are not allowed to transport seafarers out of the terminal.</p>
San Diego, CA	No consistent problems at the moment.

SECTION 402. LIMITATIONS ON MARITIME LIENS ON FISHING PERMITS

The proposal would amend 46 USC 31310 to exclude state and federal fishing vessel permits from being attached by maritime liens.

Comment:

- This proposal would enable fishing vessel operators to avoid their obligation to provide medical care for sick or injured crewmembers on their vessels. We oppose the amendment. Fishing is the most dangerous occupation in the world, and fishing vessel crews are frequently seriously injured. Some marginal fishing vessel owners operate their vessel without adequate insurance to cover medical expenses for their crews who become sick or injured while working on their vessels. In such situations, injured crewmembers must seek recovery from the owner's assets, which may be limited to the value of the fishing vessel and the fishing permit. If the fishing vessel permits are excluded from attachment by maritime liens, there may be insufficient funds available from the value of the fishing vessel to cover medical expenses.
- This is not a theoretical issue. We are assisting a seafarer who suffered grievous injuries, including loss of his arm, while working on a fishing vessel that was later discovered to be uninsured. His medical expenses have already exceeded the value of the vessel on which he was working. The vessel's owners have no assets and appear to have abandoned the vessel. His only hope for compensation is attaching a maritime lien on the fishing vessel's permit.